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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 T.B., et al.,

12 Plaintiffs,

13 v.

14 SAN DIEGO UNIFIED SCHOOL
15 DISTRICT,

16 Defendant.

Case No.: 08cv28-MMA (JMA)

**ORDER AFFIRMING IN PART
TENTATIVE RULINGS;**

[Doc. No. 382]

**ADOPTING REPORT AND
RECOMMENDATION OF SPECIAL
MASTER;**

[Doc. No. 366]

**GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
SUPPLEMENTAL MOTION FOR
ATTORNEYS' FEES AND COSTS;**

[Doc. No. 340]

**GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR ATTORNEYS' FEES
(1/19/2017 – 12/29/2017)**

[Doc. No. 376]

1 On February 9, 2018, the parties in this action appeared before the Court for a final
2 hearing regarding the award of attorneys' fees and costs to Plaintiffs ("the Brenneises")
3 under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3).
4 After considering the oral arguments of counsel, upon review of the entirety of the record
5 and for the reasons set forth below, the Court **AFFIRMS IN PART** its previously issued
6 tentative rulings, **ADOPTS** Special Master John H. L'Estrange, Jr.'s Report and
7 Recommendation, and **GRANTS IN PART** and **DENIES IN PART** the Brenneises'
8 supplemental motion for attorneys' fees and costs. In addition, the Court **GRANTS IN**
9 **PART** and **DENIES IN PART** the Brenneises' motion for attorneys' fees incurred
10 between January 19, 2017 and December 29, 2017. The Court **AWARDS** the Brenneises
11 **\$934,364.10** in attorneys' fees and costs.

12 **BACKGROUND**¹

13 The original focus of this lengthy litigation was whether Defendant San Diego
14 Unified School District ("the District") complied with the IDEA by providing Plaintiff
15 T.B. a free appropriate public education ("FAPE") for the 2006-2007 school year. The
16 parties first litigated the dispute over the course of 27 days during the summer of 2007 in
17 a due process hearing before the State of California's Office of Administrative Hearings
18 ("OAH"), Special Education Division. On October 3, 2007, Administrative Law Judge
19 ("ALJ") Susan Ruff issued a 75-page written decision ("OAH Decision"), concluding that
20 the District had failed to provide T.B. with a FAPE for the 2006-2007 school year.

21 By the time the ALJ issued her decision, a new school year (2007-2008) had
22 begun. The parties continued to discuss modifications to an Individualized Education
23 Program ("IEP") that would comply with the OAH Decision, govern the new school year,
24 and permit T.B. to attend school. Ultimately, they failed to reach mutually agreeable
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26 ¹ The Court sets forth an abridged background of this litigation. The parties are well-versed in both the
27 underlying facts and procedural history, as is the reviewing court in the event of an appeal. *See* Doc.
28 No. 291 ("This [Ninth Circuit] panel retains responsibility for further appeals that may arise in this
matter.").

1 terms.²

2 In January 2008, both parties appealed the OAH Decision to this Court. *See* 20
3 U.S.C. § 1415(i)(2)(A) (“any party aggrieved by the findings and decision made under
4 this subsection, shall have the right to bring a civil action . . . in a district court of the
5 United States, without regard to the amount in controversy.”). The Brenneises sought
6 judicial review of those aspects of the OAH Decision upon which the District prevailed,
7 as well as statutory attorneys’ fees. *See* Doc. No. 1. The District separately sought
8 review of the aspects of the OAH Decision that went in the Brenneises’ favor. *See* Doc.
9 No. 1, Case No. 08cv39. The Court consolidated the two appeals. *See* Doc. No. 22.

10 In June 2010, the Court issued an order finding that the ALJ correctly determined
11 that the District denied T.B. a FAPE for the 2006-2007 school year. *See* Doc. No. 118.
12 Thereafter, the Brenneises moved for an award of approximately \$1.4 million in
13 attorneys’ fees and costs. *See* Doc. No. 159. In March 2012, the Court issued a ruling
14 granting in part, and denying in substantial part, the request for fees. *See* Doc. Nos. 237,
15 238. The Court determined that the Brenneises are a prevailing party under the IDEA,
16 and entitled to an award of attorneys’ fees and costs. *See* Doc. No. 238 at 13. However,
17 the Court applied a statutory bar on fees pursuant to 20 U.S.C. § 1415(i)(3)(D), and
18 awarded the Brenneises a total of only \$55,433.91 in attorneys’ fees and costs. *See id.* at
19 33. In sum, the Court found that the Brenneises were not entitled to any fees or costs
20 incurred after May 4, 2007, when they rejected a final pre-hearing settlement offer from
21 the District. *See id.* at 24. The Brenneises appealed the Court’s limited award of
22 attorneys’ fees, as well as other adverse rulings of the Court. *See* Doc. No. 252.

23 On July 31, 2015, the United States Court of Appeals for the Ninth Circuit vacated
24 the Court’s award of attorneys’ fees and costs, and remanded the matter for further
25 consideration. *See T.B. v. San Diego Unified Sch. Dist.*, 806 F.3d 451 (9th Cir. 2015).

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28 ² Thereafter, the Brenneise family moved to Minnesota. *See* Doc. No. 159-3 ¶¶ 15-16. T.B. never
attended school in San Diego again.

1 The Ninth Circuit concluded, *inter alia*, that the District's settlement offer was not more
2 favorable from the perspective of the Brenneises, such that this Court should not have
3 enforced the statutory bar on post-settlement offer fees and costs. *Id.* at 477. The circuit
4 court also determined that the Court did not sufficiently explain its calculation of fees and
5 costs. *Id.* at 485.

6 In December 2015, the Brenneises filed a motion in the Ninth Circuit seeking
7 attorneys' fees related to their prosecution of the appeal. *See* Doc. No. 86, App. Case No.
8 12-56060. Thereafter, the parties filed a joint motion requesting that the Ninth Circuit
9 refer the case to mediation. *See* App. Doc. No. 90. The circuit court granted the motion,
10 and the parties participated in an unsuccessful mediation. *See* Doc. No. 276. The Ninth
11 Circuit subsequently issued an order granting the Brenneises' motion for attorneys' fees,
12 in part, concluding that the Brenneises are entitled to a fee award, but directing this Court
13 to calculate the amount of the award. *See* Doc. No. 291.

14 On February 17, 2016, the District filed a petition for writ of certiorari with the
15 Supreme Court. *See* App. Doc. No. 99. On April 18, 2016, the Supreme Court denied
16 the petition for writ of certiorari. *See* App. Doc. No. 106. On May 16, 2016, the Court
17 spread the Ninth Circuit's mandate and resumed jurisdiction over the action. *See* Doc.
18 Nos. 285, 286.

19 In November 2016, the assigned magistrate judge held a mandatory settlement
20 conference on the issue of attorneys' fees and costs, but the parties did not reach a
21 settlement. *See* Doc. No. 330. On January 18, 2017, the Brenneises filed a supplemental
22 motion for attorneys' fees and costs, which the District opposed. *See* Doc. Nos. 340, 344.

23 On March 17, 2017, the Court provided notice to the parties pursuant to Federal
24 Rule of Civil Procedure 53(b)(1) of the forthcoming appointment of a Special Master in
25 this case. *See* Doc. No. 353. The Court's Order provided as follows:

26 Pursuant to Rule 54(d)(2)(D), the Court may appoint a Special Master to assist
27 the Court in determining an award of attorneys' fees. Upon due consideration,
28 the Court finds that the determination of reasonable hourly rates for the
Brenneises' counsel and their staff, the reasonable hours expended at each

1 stage of this litigation, the lodestar calculation, and the resulting fee award,
2 will be unusually complex and place an exceptional burden on the Court.
3 Accordingly, appointment of a Special Master to accomplish these tasks in an
4 effective and timely manner is appropriate.

5 *Id.* at 1-2.³ On April 14, 2017, the Court appointed John H. L'Estrange, Jr. as a Special
6 Master "to assist the Court in determining an award of attorneys' fees and non-taxable
7 costs to the plaintiffs in this action under the IDEA." Doc. No. 360 at 1. The Court
8 instructed the Special Master to make the following determinations:

9 a. A reasonable hourly rate for the following individuals for work performed
10 on this case on behalf of the plaintiffs at each stage of this litigation: Steven
11 Wyner, Marcy Tiffany, Dana Wilkins, Dona Wright, and D. Shawn
Nicholson. In doing so, the Special Master must keep the following in mind:

12 i. The Court previously determined that San Diego is the relevant legal
13 community. This ruling may not be revisited.

14 ii. The Court previously determined that the above-named individuals
15 would be compensated at the following rates for any work performed before
16 May 4, 2007, during the administrative phase of this litigation: Steven Wyner
17 and Marcy Tiffany at \$425 per hour; Dana Wilkins at \$125 per hour; and Dona
18 Wright at \$95 per hour. The Special Master is authorized to revisit this ruling
19 in light of the Ninth Circuit's conclusion that this Court should not have
applied the statutory bar on post-settlement offer fees, and the resulting
vacatur of the fee award.

20 iii. The Court previously declined to use current billing rates for past
21 work performed. The Special Master is authorized to revisit this ruling,
22 keeping in mind that no "bonus or multiplier" may be used to calculate the
23 plaintiffs' fee award. 20 U.S.C. § 1415(i)(3)(C).

24 b. The number of compensable hours reasonably expended by the above-
25 named individuals for work performed on this case on behalf of the plaintiffs
26 at each stage of this litigation. In order to do so, the Special Master must make

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28 ³ Citations to documents filed in the CM/ECF system refer to the pagination assigned by the system,
unless otherwise noted.

1 the following determinations, and is authorized to revisit the Court's previous
2 rulings as to any or all of these issues:

3 i. Whether any particular billing entries should be reduced or denied
4 based on specific objections to those entries, including: sufficiency of the
5 billing records, firm overhead, overstaffing and duplication, and travel.

6 ii. Whether any particular billing entries should be reduced or denied
7 pursuant to 20 U.S.C. § 1415(i)(3)(D)(ii).

8 iii. Whether any particular billing entries should be reduced or denied
9 based on the apportionment of time between successful and unsuccessful
10 claims.

11 iv. Whether any particular billing entries should be reduced or denied
12 for time spent on common aspects of the litigation, including tasks related to
13 settlement, case management, client communications, and preparation of the
14 administrative record.

15 c. Based on the reasonable hourly rates and the reasonable amount of hours
16 expended during the course of this litigation, the lodestar for each of the
17 above-named individuals, and then the sum of the individual lodestar amounts
18 to determine the total fee award.

19 d. The amount of non-taxable costs properly awarded to the plaintiffs, keeping
20 in mind the Ninth Circuit's previous admonition that "[o]n remand, the court
21 should strive to explain" any "reductions more precisely." *T.B.*, 806 F.3d at
22 486. In doing so, the Special Master is authorized to revisit the Court's
23 previous ruling on non-taxable costs in all respects.

24 Doc. No. 360 at 3-4. The Court reserved for its own determination the following issues:

25 a. Whether 20 U.S.C. § 1415(i)(3)(G) precludes the Court from reducing the
26 total fee award pursuant to 20 U.S.C. § 1415(i)(3)(F), and if not, whether the
27 total fee award should be reduced based on any of the relevant factors set forth
28 in Section 1415(i)(3)(F).

b. Whether the total award of attorneys' fees and costs should be reduced
based on the plaintiffs' degree of success at each stage of this litigation.

c. Whether the plaintiffs may recover fees and costs incurred pursuing

1 “fees-on-fees-on-fees,” and if not, the extent to which the total award must be
2 reduced.

3 d. Whether the plaintiffs are entitled to interest on any fees or costs, and if so,
4 the applicable interest rate.

5 *Id.* at 5.

6 On October 2, 2017, the Special Master filed his Report and Recommendation.
7 *See* Doc. No. 366. Both parties have filed objections, as well as responses to each other’s
8 objections. *See* Doc. Nos. 369, 370, 372, 373. On December 29, 2017, the Brenneises
9 filed a motion seeking attorneys’ fees incurred between January 16, 2017 and December
10 29, 2017. *See* Doc. No. 376. The District opposes the motion. *See* Doc. No. 378.

11 **STANDARD OF REVIEW**

12 Federal Rule of Civil Procedure 53(f) sets forth the applicable standard of review
13 by the Court of a Special Master’s Report and Recommendation. “The court must decide
14 *de novo* all objections to findings of fact made or recommended” by the Special Master,
15 unless the parties stipulate otherwise. Fed. R. Civ. P. 53(f)(3). The parties have not
16 stipulated to a lesser standard of review in this case. Accordingly, the Court has
17 conducted the required *de novo* review. Likewise, “the court must decide *de novo* all
18 objections to conclusions of law made or recommended” by the Special master. Fed. R.
19 Civ. P. 53(f)(4). In taking action on the Special Master’s “report, or recommendations,
20 the court . . . may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit
21 to the master with instructions.” Fed. R. Civ. P. 53(f)(1).

22 **DISCUSSION**

23 The Brenneises now seek an award of over two million dollars in attorneys’ fees
24 and costs arising out of this litigation. *See* Doc. Nos. 340-13, 376-1. The requested fees
25 and costs are summarized in the table below:
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<u>Proceeding</u>	<u>Fees & Costs Requested</u>
Due Process Hearing (2006-2007)	\$911,582.17 ⁴
District Court Proceedings (Including “Fees on Fees”) (2008-2012)	\$586,230.92
Ninth Circuit Appeal (Including “Fees on Fees”) (2012-2015)	\$426,735.00
Ninth Circuit Mediation (2016)	\$100,953.25
Post-Remand Proceedings (Including “Fees on Fees”) (2016-2017)	\$84,242.92
SUBTOTAL:	\$2,109,744.26
Supplemental Motion for Attorneys’ Fees Incurred Between January 19, 2017 and December 29, 2017	\$99,900.00 ⁵
TOTAL:	\$2,209,644.26

1. Relevant Law

The parents of a child with a disability are entitled to an award of attorneys’ fees under Section 1415(i)(3) of the IDEA as a prevailing party “when actual relief on the merits of [the child’s] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). The relevant portions of the statute provide:

⁴ This total reflects the amount of fees requested at counsel’s 2011 billing rate for federal court litigation of \$560 per hour. *See* Doc. No. 160-4. Counsel originally billed their time for work performed on the due process proceedings at a rate of \$440 per hour, which resulted in a total bill for fees and costs in the amount of \$795,603.17. *See* Doc. No. 160-1.

⁵ This total reflects the amount of fees requested at counsel’s current billing rate of \$675 per hour. *See* Doc. No. 376-1 at 21.

1 (i) In general. In any action or proceeding brought under this section, the
2 court, in its discretion, may award reasonable attorneys' fees as part of the
3 costs-

4 (I) to a prevailing party who is the parent of a child with a disability

5 (. . .)

6 (C) Determination of amount of attorneys' fees. Fees awarded under this
7 paragraph shall be based on rates prevailing in the community in which the
8 action or proceeding arose for the kind and quality of services furnished. No
9 bonus or multiplier may be used in calculating the fees awarded under this
10 subsection.

11 20 U.S.C. § 1415(i)(3).

12 This Court previously found, and the Ninth Circuit affirmed, that the Brenneises
13 are a "prevailing party" under the IDEA, because "the relief obtained in the
14 administrative proceeding and affirmed by this Court was not *de minimis*, but was
15 substantive." Doc. No. 238 at 14; *see also*, *T.B.*, 806 F.3d at 482.

16 In order to calculate the fee award, the Court begins by calculating the number of
17 hours reasonably expended on the litigation, and then multiplying that number by a
18 reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also*,
19 *Aguirre v. Los Angeles Unified Sch. Dist.*, 461 F.3d 1114, 1115 (9th Cir. 2006). "This
20 calculation provides an objective basis on which to make an initial estimate of the value
21 of a lawyer's services." *Hensley*, 461 U.S. at 433.

22 Importantly, "[t]he product of reasonable hours times a reasonable rate does not
23 end the inquiry." *Id.* at 434. After calculating the lodestar, the Court must determine
24 whether to reduce the fee award based on the prevailing party's degree of success.
25 Where "a plaintiff has achieved only partial or limited success, the product of hours
26 reasonably expended on the litigation as a whole times a reasonable hourly rate may be
27 an excessive amount." *Id.* at 436. If so, courts have equitable discretion to reduce the
28 amount of attorneys' fees awarded. *Id.* at 436-37. The "most critical" factor is the
"degree of success obtained." *Id.* at 436. "There is no precise rule or formula for making

1 these determinations.” *Id.* at 436. The Ninth Circuit has held that this “degree of
2 success” standard applies to attorneys’ fee awarded under the IDEA. *See Aguirre*, 461
3 F.3d at 1115 (recognizing that *Hensley* applies to the IDEA attorneys’ fees statute).

4 Additionally, the Ninth Circuit “requires that courts reach attorney’s fee decisions
5 by considering some or all of twelve relevant criteria set forth in *Kerr v. Screen Extras*
6 *Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975).” *Quesada v. Thomason*, 850 F.2d 537, 539 (9th
7 Cir. 1988). The *Kerr* factors are: “(1) the time and labor required; (2) the novelty and
8 difficulty of the questions involved; (3) the skill requisite to perform the legal service
9 properly; (4) the preclusion of other employment by the attorney due to acceptance of the
10 case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations
11 imposed by the client or the circumstances; (8) the amount involved and the results
12 obtained; (9) the experience, reputation, and ability of the attorneys; (10) the
13 “undesirability” of the case; (11) the nature and length of the professional relationship
14 with the client; and (12) awards in similar cases.” *Kerr*, 526 F.2d at 70.

15 The Court also must determine whether the fee award should be reduced based on
16 statutory factors, as set forth in Section 1415(i)(3)(F), which provides in pertinent part:

17 [W]henever the court finds that—

18 (i) the parent, or the parent’s attorney, during the course of the action or
19 proceeding, unreasonably protracted the final resolution of the controversy;

20 (ii) the amount of the attorneys’ fees otherwise authorized to be awarded
21 unreasonably exceeds the hourly rate prevailing in the community for similar
22 services by attorneys of reasonably comparable skill, reputation, and
23 experience;

24 (iii) the time spent and legal services furnished were excessive
25 considering the nature of the action or proceeding; or

26 (iv) the attorney representing the parent did not provide to the local
27 educational agency the appropriate information in the notice of the complaint
28 described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

20 U.S.C. § 1415(i)(3)(F).

2. Calculation of the Lodestar

A. Reasonable Hourly Rates

At the first step in its lodestar calculation, the Court must determine a reasonable hourly rate for each attorney and staff member that worked on this case for the Brenneises. This includes three attorneys – Steven Wyner, Marcy Tiffany, and Dana Wilkins – as well as paralegals Dona Wright, David Tiffany, Jennifer Ralph, and Shawn Nicholson. The Brenneises request that the Court find the following rates reasonable:

<u>Time Keeper</u>	<u>OAH Hearing</u>	<u>District Court</u>	<u>Ninth Circuit</u>
Steven Wyner	\$400-\$475	\$560	\$675
Marcy Tiffany	\$400-\$475	\$560	\$675
Dana Wilkins	\$195-\$225	\$225	N/A
Dona Wright	\$125-\$175	\$175	N/A
David Tiffany	\$115-\$125	\$125	N/A
Jennifer Ralph	N/A	\$165	N/A
Shawn Nicholson	N/A	\$225	N/A

Doc. No. 366 at 22 (citing Doc. Nos. 160-3, 160-4, 160-11, 340-16).

The Court appointed the Special Master to make findings and recommendations regarding reasonable hourly rates for the Brenneises' counsel and their staff. After summarizing each individual's skills and experience, as well as the evidence submitted by the parties regarding hourly rates, the Special Master recommends the following reasonable hourly rates for the Brenneises' counsel and their staff throughout the course of the proceedings:

<u>Time Keeper</u>	<u>Reasonable Hourly Rate</u>
Steven Wyner	\$450
Marcy Tiffany	\$450
Dana Wilkins	\$145
Dona Wright	\$115
David Tiffany	\$115
Jennifer Ralph	\$115
Shawn Nicholson	N/A ⁶

Doc. No. 366 at 40.

i. Legal Standard

Attorneys’ fees awarded under the IDEA must be “based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.” 20 U.S.C. § 1415(i)(3)(C); *see also Sam K. ex rel. Diane C. v. Hawaii Dep’t of Educ.*, 788 F.3d 1033, 1041 (9th Cir. 2015) (“Reasonable attorney’s fees are to be calculated according to ‘the prevailing market rates in the relevant community.’”) (quoting *Van Skike v. Dir., Office of Workers Compensation Programs*, 557 F.3d 1041, 1046 (9th Cir. 2009)). “The burden is on the fee applicant ‘to produce satisfactory evidence’ of the prevailing market rates.” *Id.* “District courts may consider the fees awarded by others in the same locality for similar cases.” *Id.* (citing *Moreno v. City of Sacramento*, 534 F.3d 1106, 1115 (9th Cir. 2008)). “District courts may also use their ‘own knowledge of customary rates and their experience concerning reasonable and proper fees.’” *Id.* (quoting *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011)).

⁶ Citing an absence of proof to support Ms. Nicholson’s requested rate, the Special Master recommends that all the charges for Ms. Nicholson be disallowed. *See* Doc. No. 366 at 39. The Brenneises do not object to this particular recommendation. Nor do they seek an award of fees for any work performed by Ms. Nicholson on this action during the 2017 calendar year. Accordingly, the Court adopts the Special Master’s recommendation, and it is not necessary to determine a reasonable hourly rate for work performed by Ms. Nicholson.

1 ii. *Objections to the Report and Recommendation*⁷

2 a) The Brenneises' Objections

3 The Brenneises object on various grounds to the Special Master's recommendation
4 of a reasonable hourly rate of \$450 per hour for their counsel. As an initial matter, the
5 Brenneises argue that the Central District of California, where counsel maintain their
6 offices, is the appropriate relevant community when determining the reasonable billing
7 rate for all phases of this case. The Court previously determined that "San Diego is the
8 relevant legal community," and noted that "[t]his community charges rates lower than
9 attorneys who practice in our neighbor to the North." Doc. No. 238 at 24. The Court
10 instructed the Special Master not to revisit this aspect of its 2012 ruling. *See* Doc. No.
11 360 at 3. Accordingly, he did not. As such, this is technically not an objection to the
12 Report, as the Special Master was prohibited by the Court from considering the issue. In
13 any event, after taking into consideration the oral arguments of counsel, the Court
14 declines to reconsider its previous determination. San Diego is the relevant community.

15 Furthermore, the Court notes that a review of recent case law regarding the award
16 of attorneys' fees in IDEA actions in the Central District demonstrates that counsel's
17 requested rates are much higher than the rates found to be reasonable by courts in that
18 jurisdiction. Rather, the rates are not dissimilar from those charged in this District, and
19 are comparable with the Special Master's recommended rate of \$450 per hour. *See*
20 *Wright v. Tehachapi Unified Sch. Dist.*, No. 1:16-cv-01214 - JLT, 2017 U.S. Dist. LEXIS
21 123671, at *14-15 (E.D. Cal. Aug. 4, 2017) (finding a rate of \$425 reasonable for an
22 attorney with 19 years of experience practicing law) (citing *Beauchamp v. Anaheim*
23 *Union High School Dist.*, 816 F.3d 1216, 1224-25 (9th Cir. 2016) (affirming \$400 per
24 hour for an attorney from the Central District who had "been representing students in
25 _____

26 ⁷ As indicated in its February 8, 2018 Notice and Order providing the parties' with its tentative rulings,
27 *see* Doc. No. 382, the Court has conducted an exhaustive *de novo* review of each and every aspect of the
28 Special Master's Report and Recommendation to which objections were made. The Court's omission
from the discussion herein of a specific objection should not be construed as a failure to consider the
objection in the first instance.

1 special education matters since 1996”); *C.B. ex. rel. Baquerizo v. Garden Grove Unified*
2 *Sch. Dist.*, 2012 U.S. Dist. LEXIS 5946, 2012 WL 161806 at *3 (C.D. Cal. Jan. 18, 2012)
3 (awarding \$400 per hour for work done at the administrative level and before the District
4 Court); *Adams v. Compton Unified Sch. Dist.*, 2015 U.S. Dist. LEXIS 175811, 2015 WL
5 12748005 at *10-11 (C.D. Cal. July 16, 2015) (awarding \$390 per hour and \$410 per
6 hour); *K.M. ex rel. Bright v. Tustin Unified School District*, 78 F.Supp.3d. 1289, 1304
7 (C.D. Cal. 2015) (\$475 per hour reasonable)).

8 The Brenneises also object to the Special Master’s use of a single hourly rate for
9 all stages of these proceedings. Essentially, the Brenneises argue that as this case moved
10 from the administrative level, to district court, and on to the Ninth Circuit, that the
11 proceedings became more complex. The Court disagrees. The Special Master correctly
12 notes in his Report that the facts and general landscape of the case once it moved to this
13 Court remained the same, and the issues on appeal narrowed considerably. *See* Doc. No.
14 366 at 36.

15 The Brenneises further object to the Special Master’s recommendation that the
16 Court not use current billing rates to compensate for the delay in payment of the fee
17 award. Counsel for the Brenneises argued during the February 9 hearing that the District
18 used a “scorched earth” tactic in this case, contributing substantially to the protraction of
19 the litigation, resulting in the delay in payment, and justifying the use of current billing
20 rates in calculating the lodestar. Citing the Ninth Circuit’s holding in *In re Washington*
21 *Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Circ. 1994), the
22 Brenneises argue that the Court should employ one of two methods to account for this
23 delay: “use either current rates for attorneys of comparable ability or experience or
24 historical rates coupled with a prime rate enhancement.” *Id.* at 1305 (emphasis omitted).
25 However, as the circuit court notes in its opinion, the “district court has *discretion* to
26 compensate delay in payment.” *Id.* (emphasis added).

27 In determining whether to exercise this discretion, the Court agrees with the
28 Special Master that the use of current billing rates is not appropriate. The Brenneises’

1 complaint regarding the litigation tactics of the District does not ring hollow, but the
2 Court stands by its observation, originally made in 2012, that “[b]oth sides are
3 responsible for creating and fostering the animosity that impaired an efficient resolution
4 to the case.” Doc. No. 238 at 23, n.7 (emphasis added). While the failure to efficiently
5 resolve this action does not rise to the level of unreasonable protraction under 20 U.S.C. §
6 1415(i)(3)(F)(i),(G), as discussed further *infra*, neither side may fairly disclaim
7 responsibility for its perpetuation.

8 More to the point, as the District notes, the 2011 and 2016 declarations of Patrick
9 Frost, Assistant General Counsel for the District, show that experienced attorneys in San
10 Diego generally have charged no more than \$450 per hour over the course of this
11 litigation. *See* Doc. No. 372 at 13 (citing Doc. No. 180-4 ¶ 7; JA-50 ¶ 8; JA-53 ¶¶18-20;
12 Doc. No. 344-10 ¶¶18-20). The Court finds this evidence compelling. Furthermore, as
13 noted above, recent case law on attorneys’ fee awards in IDEA cases in the Southern
14 California region generally demonstrate that the Special Master’s recommended hourly
15 rate of \$450 is consistent with rates found reasonable by other courts. *See, e.g., Wright*,
16 2017 U.S. Dist. LEXIS 123671, at *14-15.

17 Finally, given the Court’s own familiarity with the local legal market, the Court is
18 persuaded that the hourly rate recommended by the Special Master is reasonable, and
19 compensates counsel fairly based on their years of experience and expertise practicing
20 special education law. *See Ingram, supra*, 647 F.3d at 928 (agreeing with other circuit
21 courts that “it is proper for a district court to rely on its own familiarity with the legal
22 market” in determining a reasonable rate).

23 b) The District’s Objections

24 The District objects to the Special Master’s adjustment of the hourly billing rate for
25 work performed by the Brenneises’ counsel and their staff during the administrative stage
26 of the proceedings. The District contends that the Court should continue to use the
27 previously determined rate of \$425 per hour for that phase of the proceedings. However,
28 the District does not object to the reasonableness of the \$450 per hour rate for the

1 remainder of the litigation.

2 The District's argument that the Court should not deviate from the \$425 per hour
3 rate it found reasonable in its 2012 Order is unavailing. "Lower courts are free to decide
4 issues on remand so long as they were not . . . decided explicitly or by necessary
5 implication in [the] previous disposition." *Liberty Mut. Ins. Co. v. Equal Emp't*
6 *Opportunity Comm'n*, 691 F.2d 438, 441 (9th Cir. 1982) (internal citations omitted).
7 Here, the Ninth Circuit was silent as to the reasonableness of the hourly rates as
8 determined by the Court in its 2012 Order. Upon due consideration, the Court explicitly
9 gave the Special Master authority to revisit the rates when calculating the lodestar. *See*
10 Doc. No. 360 at 3. In doing so, the Special Master has recommended a reasonable rate
11 based in large part on the District's own evidence.

12 *iii. Conclusion*

13 The Court **OVERRULES** both parties' objections, **ADOPTS** the Special Master's
14 recommendation, and **FINDS** that the following constitute reasonable hourly rates for the
15 Brenneises' counsel and staff for their work throughout the course of these proceedings:

16

<u>Time Keeper</u>	<u>Reasonable Hourly Rate</u>
Steven Wyner	\$450
Marcy Tiffany	\$450
Dana Wilkins	\$145
Dona Wright	\$115
David Tiffany	\$115
Jennifer Ralph	\$115

23

24 B. Reasonable Hours Expended

25 At the second step in its lodestar calculation, the Court must determine the number
26 of compensable hours the Brenneises' counsel and their staff reasonably expended on this
27 litigation. The Court appointed the Special Master to make findings and
28 recommendations as to this exceedingly difficult task. *See* Doc. No. 360 at 3. The

1 Special Master has undertaken a meticulous review of the Brenneises' counsel's billing
2 records, as well as the District's general objections and individual objections to specific
3 billing entries,⁸ in order to formulate his recommendations concerning the compensable
4 time expended by the Brenneises' counsel and their staff at each stage of this litigation.

5 With respect to the Special Master's recommendations, the Brenneises primarily
6 object to the disallowance of counsel's time spent traveling between Torrance, California,
7 the location of their offices, and San Diego. The District's objections are far more
8 comprehensive. The District raises multiple objections to the Special Master's
9 calculations, including the Special Master's recommended rulings on objections to
10 individual billing entries, and requests that the Court make additional deductions to the
11 compensable time calculation for the following reasons: duplicative work, overstaffing,
12 and lack of contemporaneous billing records for time keeping during the due process
13 hearing and at the district court level; additional billing issues at the district court level;
14 non-recoverable time, before, during, and after the due process hearing; time spent in this
15 Court on the merits of the Brenneises' claims after November 18, 2009, the date the
16 Brenneises filed their response in opposition to the District's motion for partial summary
17 judgment as to its IDEA claim; and excessive time spent on the Ninth Circuit appeal. *See*
18 *Doc. No. 369 at 16-19.*

19 The Court briefly summarizes the Special Master's findings and recommendations
20 below, and addresses particular objections in certain instances.

21 *i. Relevant law*

22 "The fee applicant bears the burden of documenting the appropriate hours
23 expended in the litigation and must submit evidence in support of those hours worked."
24 *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992) (citing *Hensley*, 461 U.S. at
25 _____)

26 ⁸ The District raised objections to counsel's billing records on multiple grounds, organized into seven
27 general categories: non-recoverable, protraction, clerical, duplicative, internal conference, lacks
28 specificity, unnecessary, and travel. *See Doc. No. 180-3 at 10.* The Special Master considered each
category of objections to counsel's billing records at each stage of the litigation, as to each objectionable
billing entry. *See Doc. No. 366 at 40-130.*

1 433, 437). “The party opposing the fee application has a burden of rebuttal that requires
2 submission of evidence to the district court challenging the accuracy and reasonableness
3 of the hours charged or the facts asserted by the prevailing party in its submitted
4 affidavits.” *Id.* at 1397-98 (citing *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984) and
5 *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir. 1987)).

6 ii. *Compensable Hours: OAH Due Process Hearing (2006-2007)*

7 The Special Master recommends the Court find that the Brenneises’ counsel and
8 their staff reasonably expended 2533.3 hours of compensable time for their work during
9 the administrative stage of these proceedings. *See* Doc. No. 366 at 57. This includes
10 compensation for the majority of the time requested. A significant portion of the Special
11 Master’s deductions are attributable to his recommendation that the Brenneises’ counsel
12 and their staff not be compensated for time spent traveling between Torrance and San
13 Diego. *See id.* at 52-53. The Special Master notes that the Brenneises failed to provide
14 any evidence that it is customary in the San Diego legal community to charge for travel
15 time. He also points out that billing for travel time is generally allowed in cases where
16 the prevailing party shows that it would not have been able to hire competent local
17 counsel to handle the work, an argument which he recommends the Court reject in this
18 case. *Id.* at 52.

19 With respect to the administrative proceedings, the Court specifically instructed the
20 Special Master to consider whether any particular billing entries should be reduced or
21 deducted pursuant to Section 1415(i)(3)(D)(ii) of the IDEA. *See* Doc. No. 360 at 4.
22 Pursuant to this section of the IDEA, “[a]ttorneys’ fees may not be awarded relating to
23 any meeting of the IEP Team unless such meeting is convened as a result of an
24 administrative proceeding or judicial action, or, at the discretion of the State, for a
25 mediation described in subsection (e).” 20 U.S.C. § 1415(i)(3)(D)(ii). The Special
26 Master reviewed counsel’s billing records, as well as the objections raised by the District,
27 and determined whether time should be deducted on this basis. *See* Doc. No. 366 at 43.
28 The District objects to the Special Master’s recommended deductions, arguing that many

1 more time entries involved work done in relation to IEP implementation, particularly
2 after the due process hearing had concluded. However, as he explains in his Report, the
3 Special Master deducted time in accordance with the accuracy of the information
4 available. *See id.*

5 *iii. Compensable Hours: District Court Litigation (2008-2012)*

6 The Special Master has subdivided the Brenneises' fee request for work in this
7 Court performed through 2012 into several parts including: (a) fees incurred in defense of
8 the IDEA claim in the District's complaint (upon which the Brenneises prevailed,
9 rendering them entitled to a fee award in this action); (b) fees incurred in the prosecution
10 of the claims in the Brenneises' complaint for work that was common to the work done
11 on defense of the District's IDEA claim; (c) fees incurred in the prosecution of the third
12 cause of action in Plaintiffs' second amended complaint relating to the CDE compliance
13 complaint (including the unsuccessful 2008 interlocutory appeal by the District); and (d)
14 fees incurred filing a motion for reconsideration of the Court's 2012 award of attorneys'
15 fees and costs. As noted above, in calculating the reasonable hours expended by the
16 Brenneises' counsel and their staff during this stage of the proceedings, the Special
17 Master considered the District's myriad objections to counsel's billing records. The most
18 substantial objections are discussed below.

19 a) Apportionment

20 The Brenneises seek fees for time expended successfully defending against the
21 District's IDEA claim and succeeding on their fees-on-fees claim regarding the CDE
22 compliance complaint. The Brenneises acknowledge that fees should not be awarded for
23 all aspects of the pre-appeal litigation in this Court. To this end, the Brenneises segregate
24 out the time expended on their unsuccessful IDEA claim, and their civil rights claims.
25 However, the District objects to the Brenneises' apportionment of time between
26 successful and unsuccessful claims. The District contends that these time entries should
27 be reduced across the board by fifty percent to account for the fact that only some of the
28 time could be attributed to the defense against the District's first cause of action.

1 Likewise, the District objects to individual billing entries for work performed in relation
2 to all claims, i.e., attendance at the Early Neutral Evaluation conference, settlement
3 activities, and communications with the client. *See* Doc. No. 180-1 at 12.

4 The Special Master concludes that the fifty percent reduction proposed by the
5 District does not have a reasoned basis, and citing *Hensley, supra*, recommends that the
6 District's "apportionment" objection be overruled:

7 The issue is whether the first claim in the District's complaint is "related" to
8 the other claims in the District's complaint and the claims in Plaintiffs' second
9 amended complaint as that term is used in *Hensley*. All the claims in the
10 District's complaint and Plaintiffs' second amended complaint relate to the
11 same basic set of facts: the assessments and IEP meetings relating to T.B.'s
12 2006-2007 school year and the conduct of and results from the related OAH
13 hearing. Activities such as the ENE and other similar events are common to
14 the case as a whole and Plaintiffs are entitled to fees spent on these activities
15 without a deduction of 50% or any other percentage.

16 I reviewed all the time entries on the District's Exhibit A, and find that they
17 all apply equally to Plaintiffs defense of the IDEA claim in the District's first
18 cause of action and to other related claims in the case. Accordingly, I
19 recommend that the District's "Apportionment" objection be overruled in its
20 entirety.

21 Doc. No. 366 at 56.

22 b) Non-Recoverable

23 The District also objects to various billing entries on the grounds of "Non-
24 Recoverable", which generally involved objecting to any time entry in counsel's billing
25 records for (i) work related solely to the Brenneises' unsuccessful appeal in the District
26 Court of the parts of the OAH decision they lost, including their attempt to have the
27 compensatory education they sought go into effect immediately; (ii) all work on the
28 Brenneises' second amended complaint, because the only changes from the first amended
complaint were to add ultimately unsuccessful claims under Section 504 and the ADA;
(iii) overhead items such as attorney conflicts checks and fee agreements; (iv) all time on
discovery since the only discovery initiated by the Brenneises' was on the Section 504

1 and ADA claims; (v) time spent on researching the credibility of witness Dr. Howard
2 Taras after completion of the OAH hearing; and (vi) time spent in discussing a
3 Nursing/Emergency Care Plan with the Brenneises since no such plan was ever drafted
4 by the District and therefore it is irrelevant. *See* Doc. No. 180-1 at 11-12. The Special
5 Master considered each of these grounds for the District’s objections, and recommends
6 that the Court sustain the objections. *See* Doc. No. 366 at 61-62.

7 c) Protraction

8 The District objects to a number of billing entries on the ground the work
9 performed led to the unreasonable protraction of the litigation. *See* Doc. No. 180-1 at 46-
10 57. The District contends that the Brenneises engaged in a number of unnecessary
11 delaying tactics to prevent the District from filing a motion for summary judgment on its
12 appeal of the OAH decision. The Brenneises respond that the District bears the
13 responsibility for unreasonably protracting this litigation. The Special Master considered
14 both parties’ arguments regarding the issue of protraction, and recommends that all the
15 objections on the ground of “protraction” be overruled. *See* Doc. No. 366 at 73-74.

16 d) CDE Compliance Complaint

17 The third cause of action in the Brenneises’ second amended complaint alleged a
18 claim for recovery of attorneys’ fees for a successful CDE compliance complaint against
19 the District. *See* Doc. No. 65 at 6. On May 20, 2011, the District served a Rule 68 offer
20 of judgment limited to the third cause of action in the second amended complaint. *See*
21 Doc. No. 151-1. The terms of that offer provided for a judgment in the amount of
22 \$7,113.50 for fees incurred in connection with a CDE compliance complaint, “plus
23 reasonable attorney’s fees and costs incurred by plaintiffs on the Third Claim for Relief
24 (and prior versions thereof in earlier pleadings in this case) prior to the date of this offer
25 in an amount to be set by the Court.” Doc. No. 366 at 86 (citing Doc. No. 151-1 at 2:4-
26 6). Plaintiffs accepted that offer. *See* Doc. No. 151. As part of their 2011 fee
27 application, Plaintiffs sought \$48,173.00 on the accepted Rule 68 offer of judgment
28 related to the CDE compliance complaint. *See* Doc. No. 160-18.

1 In its 2012 Order, this Court denied a request for further fees beyond the \$7,113.50
2 principal amount of the judgment on the ground the parties previously settled that
3 dispute. *See* Doc. No. 238 at 31. However, the Ninth Circuit ordered that on remand the
4 Court determine what additional fees are owed to the Brenneises for recovering the
5 \$7,113.50 for the CDE compliance complaint. *See T.B.*, 806 F.3d at 485. The Special
6 Master has completed this task, and recommends the Court find that the Brenneises’
7 counsel and their staff expended 82 hours in compensable time performing work related
8 to the CDE compliance complaint prior to the date of the Rule 68 offer of judgment on
9 that claim. *See* Doc. No. 366 at 94.

10 e) Motion for Reconsideration

11 The Brenneises also seek fees for work performed by counsel associated with the
12 motion they brought in 2012 requesting this Court to reconsider its award of attorneys’
13 fees and costs. *See* Doc. No. 340-13. After considering the District’s objections and
14 disallowing certain time entries, the Special Master recommends the Court find the
15 Brenneises’ counsel reasonably expended 77.3 hours working on the motion for
16 reconsideration. *See* Doc. No. 366 at 116.

17 iv. *Compensable Hours: Ninth Circuit Litigation (2012-2015)*

18 In an August 10, 2016 memorandum order, the Ninth Circuit granted the
19 Brenneises’ motion for an award of attorneys’ fees incurred on appeal. *See* Doc. No.
20 291. The circuit court held that the Brenneises “are entitled to some amount of attorneys’
21 fees for their successful appeal of the district court’s [attorneys’ fees] award.” *Id.* at 2.
22 The Ninth Circuit then transferred the matter to this Court “for the sole purpose of
23 determining the amount to be awarded as fees on appeal, taking into account the fees to
24 be awarded for work in the district court and before the ALJ.” *Id.* The Court assigned
25 this task to the Special Master, who considered the District’s objections to counsel’s
26 billing records, and recommends that the Court find the Brenneises’ counsel reasonably
27 expended 452.6 hours on the Ninth Circuit appeal. *See* Doc. No. 366 at 104.
28

1 v. *Compensable Hours: Ninth Circuit Mediation (2016)*

2 On February 5, 2016, the parties participated in a mediation conducted by the
3 Ninth Circuit mediator that lasted less than a day. *See* App. Doc. No. 93. After
4 considering the District’s objections to certain billing entries, the Special Master
5 concludes that the Brenneises’ counsel performed 130.6 hours of work on the Ninth
6 Circuit mediation. *See* Doc. No. 366 at 119. However, he also recommends reducing
7 this amount by fifty percent based on the *Kerr* factors, and that portion of the IDEA
8 statute which permits reduction of any fee award for “services furnished that were
9 excessive considering the nature of the action or proceeding,” 20 U.S.C. § 1415
10 (i)(3)(F)(iii). *See id.* at 120.

11 vi. *Compensable Hours: Post-Remand Activities and “Fees on Fees”*

12 The Special Master recommends that the Court find the Brenneises’ counsel and
13 their staff reasonably expended 46.6 hours on post-remand activities in this Court,
14 unrelated to the work done in relation to “fees on fees.” *See id.* at 113. The Special
15 Master further recommends that the Court find the Brenneises’ entitled to “fees on fees”
16 for the work spent on the various attorneys’ fees applications at issue in this litigation.
17 The Special Master correctly observes that other courts in this Circuit award “fees on
18 fees” in IDEA cases, and recommends that the Court find the Brenneises’ counsel and
19 their staff reasonably expended 318.9 hours working on the 2011 fee application in this
20 Court; 21.1 hours working on the Ninth Circuit fee application; and 30 hours on the
21 supplemental briefing submitted in this Court post-remand (referred to by the Special
22 Master as the “2017 fee application”). *See id.* at 127-30.

23 vii. *Conclusion*

24 The Court has decided *de novo* all objections to the Special Master’s findings and
25 conclusions. Upon due consideration, the Court **OVERRULES** the parties’ objections to
26 the Special Master’s calculation of the reasonable hours expended by the Brenneises’
27 counsel and their staff at each stage of this litigation, and **ADOPTS** his recommended
28 calculations.

3. *Costs*

A. Taxable Costs

Taxable costs are limited to those listed in the general cost statute, 28 U.S.C. § 1920, including expenses for court reporters, witnesses, copies of papers, and other items. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987); *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988). Items that are customarily taxed in this District are set forth in Civil Local Rule 54.1, and include such items as fees for service of process, fees incident to transcripts, deposition costs, and witness fees. *See* S.D. CAL. LR 54.1.b. In its 2012 Order, the Court indicated that it “prefers that the Clerk of the Court have the first opportunity to review the cost bill, as the initial review will narrow any disputes on taxable costs.” Doc. No. 238 at 32. Likewise, in paragraph 7 of its Order appointing a Special Master in this action, the Court confirmed its intent to refer the calculation of taxable costs to the Clerk of Court, consistent with Civil Local Rule 54.1. *See* Doc. No. 360 at 5. Accordingly, it will be the Brenneises’ responsibility to submit their application for taxable costs directly to the Clerk of Court for consideration within fourteen (14) days from the date this Order is filed.

B. Non-Taxable Costs

The Brenneises seek an award of non-taxable costs, which they have properly requested in their fee applications. *See* Fed. R. Civ. P. 54(d)(2) (describing motion for “attorney’s fees and related nontaxable expenses”). The Court appointed the Special Master to make findings and recommendations regarding the Brenneises’ requested non-taxable costs. *See* Doc. No. 360 at 4.

The Ninth Circuit noted in its opinion that “the court’s ruling on nontaxable costs suffered from the same lack of clarity, although the absolute effect is much smaller.” *T.B.*, 806 F.3d at 486. The circuit court instructed the Court on remand to “strive to explain its reductions more precisely.” *Id.* The Special Master heeded the Ninth Circuit’s instructions, and has undertaken a thorough review of the Brenneises’ requests for reimbursement of non-taxable costs at various stages of the litigation. The Special

1 Master recommends that the Brenneises receive a limited award for those non-taxable
2 costs which are allowable and sufficiently documented. The Court briefly summarizes
3 his recommendations below.

4 The Special Master recommends that the following charges incurred during the due
5 process hearing be reimbursed to the Brenneises: 1) the use of an attorney service in the
6 amount of \$150.00 for delivering or serving a legal document relating to the OAH
7 hearing; and 2) Lexis-Nexis costs in the amount of \$288.29 for research. *See* Doc. No.
8 366 at 56. The Special Master recommends all other non-taxable costs for which the
9 Brenneises request reimbursement be excluded, in large part due to insufficient
10 documentation. This results in an award of \$438.29 for non-taxable costs incurred during
11 the administrative stage of these proceedings.

12 The Special Master also recommends that nearly all of the non-taxable costs
13 incurred by the Brenneises in defense of the District's IDEA claim be denied, largely due
14 to the failure to properly document the expenses. *See* Doc. No. 366 at 75. He
15 recommends permitting reimbursement in the amount of \$87.25 for non-taxable costs
16 related to properly documented copying expenses. *See id.* at 81. In addition, the Special
17 Master recommends that the Court decline to award the Brenneises any non-taxable costs
18 incurred litigating in this Court post-remand, noting that the descriptions of the non-
19 taxable costs are vague, and the Brenneises provided no receipts. *See id.* at 114.

20 Finally, the Special Master recommends the Court allow the Brenneises' request
21 for non-taxable costs for the use of the PACER filing system in relation to the Ninth
22 Circuit mediation, totaling \$59.80. However, like the attorneys' fees award for that stage
23 of the litigation, the Special Master recommends that this amount be reduced by fifty
24 percent, resulting in a total of \$29.90. *See id.* at 121.

25 The Brenneises object to the Special Master's recommended reduction of their
26 requested award of non-taxable costs. The Brenneises acknowledge that "an issue has
27 been raised regarding the adequacy of Plaintiffs' description of costs," but do not address
28

1 the primary problem with their request identified by the Special Master – the lack of
2 sufficient documentation. Doc. No. 370 at 13.

3 The District objects to the Special Master’s recommendation that non-taxable costs
4 be awarded in any amount to the Brenneises. The District cites to the Supreme Court’s
5 holding in *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), as
6 support for the proposition that prevailing parties may not recover non-taxable costs
7 under the IDEA. *See* Doc. No. 369 at 19. The Special Master relied upon persuasive
8 authority to conclude that the District’s objection should be overruled. *See* Doc. No. 366
9 at 114. *Arlington* dealt specifically with the recovery under the IDEA of expert fees.
10 *Arlington*, 548 U.S. at 304. Accordingly, the Court finds *Arlington* distinguishable,
11 agrees with the Special Master, and further notes that the Ninth Circuit had an
12 opportunity in this case to determine that non-taxable costs are not recoverable under the
13 IDEA. The circuit court did not so determine, and instead remanded the case with
14 instructions to “strive to explain” any reductions to the award of non-taxable costs “more
15 precisely.” *T.B.*, 806 F.3d at 486.

16 C. Conclusion

17 The Court **OVERRULES** both parties’ objections and **ADOPTS** the Special
18 Master’s recommended award of non-taxable costs in the total amount of \$555.44.

19 ***4. Supplemental Motion for Attorneys’ Fees Incurred Between January 19,***
20 ***2017 and December 29, 2017***

21 On December 29, 2017, the Brenneises filed a motion seeking attorneys’ fees for
22 counsel’s work performed between January 19, 2017 and December 29, 2017. *See* Doc.
23 No. 376. This includes time spent on the following three tasks: 1) preparing and filing
24 supplemental briefing in support of the 2011 and Ninth Circuit fee applications; 2)
25 participating in failed settlement efforts before the assigned magistrate judge; and 3)
26 responding to issues related to the appointment of the Special Master and objecting to the
27 Report and Recommendation. *See id.* at 3. According to the Brenneises, their counsel
28 expended a total of 242.6 hours performing work related to this action during this time

1 period. *See id.* at 4. The Brenneises propose a deduction of 94.6 of those hours, and
2 request reimbursement for 148 hours. *See id.* The District opposes the fee request in its
3 entirety. *See* Doc. No. 378.

4 Prior to the February 9 hearing, the Court tentatively concluded that compensation
5 for the requested hours would not be reasonable, primarily on the ground that the
6 Brenneises' motion requests "fees on fees on fees." *See* Doc. No. 382 at 2. In the
7 Court's view, while the Brenneises "are entitled to fees incurred during the adjudication
8 of the due process complaint and for fees incurred in obtaining the reimbursement of
9 those fees . . . , receiving 'fees on fees on fees' is too attenuated from the adjudication of
10 the due process complaint to be reimbursable." *Wright v. District of Columbia*, 883 F.
11 Supp. 2d 132, 134 (D.D.C. 2012). However, the Court has re-examined counsel's billing
12 records, and finds that consistent with the Special Master's recommendation that an
13 award of "fees on fees" be allowed in this action, the Brenneises' are entitled to a limited
14 award of "fees on fees" for work performed between January 19, 2017 and March 19,
15 2017.

16 The Brenneises' counsel billed 83.9 hours for work performed in relation to the
17 supplemental briefing on their motion for an award of attorneys' fees under the IDEA.
18 *See* Doc. No. 376-1 at 6-12. The District objects to the majority of billing entries during
19 this three-month time period as "excessive, unnecessary, unreasonable protraction of the
20 litigation." Doc. No. 378-1 at 9-16. The Court has reviewed each of the billing entries to
21 which the District objects, and agrees that a reduction is appropriate based on the
22 excessive amount of time preparing a reply brief in support of the Brenneises'
23 supplemental motion for attorneys' fees. *See* 20 U.S.C. § 1415(i)(3)(F)(iii). The
24 Brenneises have proposed to deduct 22.5 hours from the total amount of time spent by
25 counsel working on the briefing for the supplemental fee motion. *See* Doc. No. 376 at 4.
26 The Court finds that this proposed deduction is sufficient to address the excessive amount
27 of time spent by counsel on the preparation of the reply brief.

28 Accordingly, the Brenneises request reimbursement for 61.4 hours expended by

counsel between January 19, 2017 and March 19, 2017. The Court finds this amount of hours reasonable. At the rate of \$450 per hour, which the Court finds reasonable for the reasons set forth in the Special Master's Report, the calculation of the lodestar results in a total award of fees incurred between January 19, 2017 and March 19, 2017 in the amount of \$27,630.00.

5. Total Award

Based on the reasonable hourly rates recommended by the Special Master, the reasonable amount of hours expended during the course of this litigation as calculated by the Special Master and this Court, and the non-taxable costs found by the Special Master, the Court awards the Brenneises attorneys' fees and costs as follows:

<u>Proceeding</u>	<u>Fees & Costs Awarded</u>
Due Process Hearing (2006-2007)	\$563,049.79
District Court Proceedings (Including "Fees on Fees") (2008-2012)	\$399,839.75
Ninth Circuit Appeal (Including "Fees on Fees") (2012-2015)	\$203,670.00
Ninth Circuit Mediation (2016)	\$29,414.45
Post-Remand Proceedings (Including "Fees on Fees") (2016-2017)	\$20,970.00
SUBTOTAL:	\$1,216,943.99
Supplemental Motion for Attorneys' Fees Incurred Between January 19, 2017 and December 29, 2017	\$27,630.00
TOTAL:	\$1,244,573.99

6. Reduction of Fee Award

After calculating the total fee award, as set forth above, the Court must consider whether to reduce the award on one or more grounds. First, the Court must consider the

1 fee award in light of “some or all of twelve relevant criteria set forth in *Kerr v. Screen*
2 *Extras Guild, Inc.*” *Quesada, supra*, 850 F.2d at 539. In this case, the *Kerr* factors are
3 almost completely subsumed in the lodestar calculation. The Special Master considered
4 the *Kerr* factors when calculating the lodestar, and the Court adopts his findings in full.

5 Second, the Court must determine whether to reduce the Brenneises’ fee award
6 based on any of the relevant factors set forth under the IDEA. As noted in its
7 appointment order, the Court reserved for its own determination whether 20 U.S.C. §
8 1415(i)(3)(G) precludes the Court from reducing the Brenneises’ total fee award pursuant
9 to 20 U.S.C. § 1415(i)(3)(F), and if not, whether the total fee award should be reduced
10 based on any of the relevant factors set forth in Section 1415(i)(3)(F). *See* Doc. No. 360
11 at 5. Finally, the Court must determine whether the total award of attorneys’ fees and
12 costs should be reduced based on the Brenneises’ limited or partial degree of success at
13 each stage of this litigation.

14 A. Statutory Reduction: IDEA Factors

15 The IDEA provides several grounds for reducing a plaintiff’s fee award:

16 (F) Reduction in amount of attorneys’ fees. Except as provided in [the
17 following] subparagraph [(G)], whenever the court finds that—

18 (i) the parent, or the parent’s attorney, during the course of the action
19 or proceeding, unreasonably protracted the final resolution of the controversy;

20 (ii) the amount of the attorneys’ fees otherwise authorized to be
21 awarded unreasonably exceeds the hourly rate prevailing in the community
22 for similar services by attorneys of reasonably comparable skill, reputation,
23 and experience;

24 (iii) the time spent and legal services furnished were excessive
25 considering the nature of the action or proceeding; or

26 (iv) the attorney representing the parent did not provide to the local
27 educational agency the appropriate information in the notice of the complaint
28 described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys’ fees
awarded under this section.

(G) Exception to reduction in amount of attorneys’ fees. The provisions of
subparagraph (F) shall not apply in any action or proceeding if the court finds

1 that the State or local educational agency unreasonably protracted the final
2 resolution of the action or proceeding or there was a violation of this section.

3 20. U.S.C. § 1415(i)(3)(F).

4 *i. Section 1415(i)(3)(F)(i),(G)*

5 Before the Court can determine whether any reductions to the Brenneises' fee
6 award are appropriate based on the factors set forth in the IDEA, it must address the
7 Brenneises' argument that the District unreasonably protracted this litigation. If the
8 Court so finds, Section 1415(i)(3)(G) will prohibit a reduction of the Brenneises' fee
9 award based on any of the factors set forth in Section 1415(i)(3)(F).

10 The Brenneises contend that the District unreasonably protracted the final
11 resolution of this litigation by, *inter alia*, refusing to comply with the terms of the OAH
12 Decision favorable to the Brenneises; appealing the OAH Decision to this Court; bringing
13 claims against the Brenneises and their attorneys; and filing a frivolous interlocutory
14 appeal with the Ninth Circuit at the outset of this action. *See* Doc. No. 190 at 6. In
15 addition, post-remand, the Brenneises have raised a new argument. According to the
16 Brenneises, the District unreasonably protracted this litigation by knowingly
17 misrepresenting to this Court and the Ninth Circuit that its May 3, 2007 settlement offer
18 was timely and qualified as a statutory offer. *See* Doc. No. 340 at 9.

19 Under the IDEA, "[a]ttorneys' fees may not be awarded and related costs may not
20 be reimbursed in any action or proceeding under this section for services performed
21 subsequent to the time of a written offer of settlement to a parent if the offer is made . . .
22 in the case of an administrative proceeding, *at any time more than 10 days before the*
23 *proceeding begins.*" 20 U.S.C. § 1415(D)(i)(I) (emphasis added). The Brenneises assert
24 that the District purposefully misrepresented throughout this litigation that the District's
25 last settlement offer was made more than ten days before the OAH due process hearing
26 began on May 14, 2007. Instead, the Brenneises argue that although the offer letter is
27 dated May 3, 2007, the fax cover sheet indicates that the offer was not "made," i.e. sent
28 via facsimile to the Brenneises' counsel, until May 4, 2007, one day late. This one-day

1 discrepancy is essential, the Brenneises assert, because “the District’s misrepresentation
2 of the timeliness of the May offer resulted in this Court reaching a conclusion that it
3 would not have otherwise reached.” Doc. No. 340 at 15.

4 The Brenneises’ argument is without merit. There is no indication in the record
5 that the District purposefully concealed the timing of their final settlement offer at any
6 stage in this litigation. In May 2007, the District could not have hidden the fact that it
7 faxed the settlement offer to counsel on May 4, 2007 – the fax cover letter is dated as
8 such. *See* Doc. No. 340-7. The declaration of Elizabeth Estes, cited by the District in
9 support of this version of events, omits this information, instead referring to the date on
10 the letter itself, May 3, 2007. *See* Doc. No. 180-3 at 7. However, the copy of the letter
11 attached as an exhibit to Estes’ declaration clearly shows the fax header dated May 4,
12 2007. *See* Doc. No. 193-3 at 85. And in its response in opposition to the Brenneises’
13 2011 fee application, the District expressly acknowledged that it made the settlement
14 offer on May 4, 2007:

15 *On the morning of May 4, 2007, the District sent Plaintiffs a cover letter with*
16 *a revised settlement agreement, which was the same as the March 13, 2007*
17 *settlement agreement except that it offered \$150,000 per year to privately*
18 *educate T.B., and a clause that would allow T.B. to reenroll in the District*
19 *during any year except 2007-2008 as Plaintiffs were clear that they wanted to*
20 *continue T.B.’s home program for at least that period of time.*

21 Doc. No. 180 at 20 (emphasis added).

22 Furthermore, counsel for the Brenneises acknowledged receipt of the offer on May
23 4, 2007. *See* Doc. No. 340 at 4. However, the Brenneises did not reject the offer as
24 untimely under the IDEA. Instead, counsel countered the offer later that day, which the
25 District ultimately rejected. *See* Doc. No. 180-3 at 8. As for the current litigation, the
26 cover letter with the May 4, 2007 fax header has been a part of the record in this case
27 since September 2011. Yet, when the information would have been potentially relevant
28 to the issues before the Court, *neither* party asserted that the settlement offer violated the
deadline set forth in Section 1415(i)(3)(D)(i)(I).

1 The Court finds that the District did not unreasonably protract this litigation. As
2 such, it may reduce the Brenneises' award of attorneys' fees and costs if it finds that the
3 Brenneises unreasonably protracted the final resolution of the controversy. *See* 20 U.S.C.
4 § 1415(i)(3)(F)(i). The District urges the Court to make this finding. *See* Doc. No. 180
5 at 17. In a nutshell, the District argues that the Brenneises have unreasonably protracted
6 this litigation at every stage, beginning with their refusal to attend the August 30, 2006
7 IEP team meeting, and as such, the Court should drastically reduce the fee award. *Id.* at
8 18.

9 The Special Master considered the issue of unreasonable protraction of the
10 litigation as a whole, and recommends that the Court decline to find that either party
11 unreasonably protracted the litigation:

12 I considered the evidence offered by both sides on the issue of prolonging the
13 proceedings and recommend that the Court find that both sides litigated this
14 case very aggressively, but not to the point where they unnecessarily
15 prolonged the proceedings. There was nothing in the decision from the OAH
16 hearing indicating that the ALJ felt that either side was obstructionist or
17 wasted time. In fact, in paragraph 18 of her decision (on page 7) the ALJ
18 commented as to Mr. Wyner, "[Student's mother] ... was represented during
19 the 2006-2007 school year by one of the most respected special education
20 attorneys in the field."

21 There were no awards of sanctions at any level of this proceeding.

22 The lawyers may not have always gotten along with each other, but based on
23 the evidence presented, I recommend the Court find that neither side engaged
24 in improper conduct that prolonged the proceedings.

25 Doc. No. 366 at 134.

26 The Court finds the Special Master's analysis on this issue to be right on point.
27 Briefly stated, these proceedings are the result of parents, unwilling to compromise the
28 needs of their child and represented by zealous advocates, at loggerheads with a school
district of limited means and flexibility. Accordingly, the Court **ADOPTS** the Special
Master's recommendation and declines to find that either the Brenneises or the District

1 unreasonably protracted this litigation.

2 *ii. Section 1415(i)(3)(F)(ii)*

3 The Court may also reduce the Brenneises' fee award if it "finds that . . . the
4 amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds
5 the hourly rate prevailing in the community for similar services by attorneys of
6 reasonably comparable skill, reputation, and experience." 20 U.S.C. § 1415(i)(3)(F)(ii).
7 The District urges the Court to reduce the Brenneises' fee award on this basis; however,
8 the Special Master has recommended a reasonable hourly rate in line with other attorneys
9 in San Diego of comparable skill. The Court adopts the recommended rate of \$450 per
10 hour. Therefore, a reduction of the fee award under this section of the statute is
11 inappropriate.

12 *iii. Section 1415(i)(3)(F)(iii)*

13 The IDEA also authorizes the Court to reduce the Brenneises' fee award if "the
14 time spent and legal services furnished were excessive considering the nature of the
15 action or proceeding." 20 U.S.C. § 1415(i)(3)(F)(iii). As noted above, the Special
16 Master has recommended that the Court reduce the Brenneises' fee award for work
17 performed by their counsel in relation to the single-day, failed Ninth Circuit mediation,
18 by fifty percent under this provision of the IDEA. The Special Master also recommended
19 a reduction for excessive time spent working on the 2017 fee application. In addition, the
20 Court relied on this factor as a justification for reducing the compensable hours spent by
21 the Brenneises' counsel on certain work done between January 19, 2017 and March 19,
22 2017. The Court declines to make any further reductions under this provision of the
23 IDEA.

24 B. Equitable Reduction: Degree of Success

25 The Court must also determine whether to reduce the Brenneises' award of
26 attorneys' fees and costs based on the Brenneises' relative degree of success.

27 *i. Relevant Law*

28 Where only "partial or limited success" is obtained by a party, a full fee award may

1 be excessive. *Hensley, supra*, at 436. When determining whether to reduce the
2 attorneys' fees sought by a prevailing party who achieved only partial success, the Ninth
3 Circuit, following *Hensley*, instructs district courts to apply the following two-step
4 analysis:

5 First, the court asks whether the claims upon which the plaintiff failed to
6 prevail were related to the plaintiff's successful claims. If unrelated, the final
7 fee award may not include time expended on the unsuccessful claims. If the
8 unsuccessful and successful claims are related, then the court must apply the
9 second part of the analysis, in which the court evaluates the "significance of
10 the overall relief obtained by the plaintiff in relation to the hours reasonably
11 expended on the litigation." If the plaintiff obtained "excellent results," full
12 compensation may be appropriate, but if only "partial or limited success" was
13 obtained, full compensation may be excessive. Such decisions are within the
14 district court's discretion.

13 *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) (internal citations
14 omitted).

15 In reducing the lodestar to account for a party's limited success, the Court is not
16 guided by a precise formula. *See Hensley*, 461 U.S. at 436-37; *Aguirre, supra*, 461 F.3d
17 at 1122. The Court may identify particular hours that should be eliminated, or it may
18 simply reduce the award to account for the limited success. *Aguirre*, 461 F.3d at 1122.

19 *ii. Analysis*

20 To determine whether and how much to reduce the Brenneises' award of attorneys'
21 fees and costs, the Court must engage in the two-step inquiry described above.⁹ First, the
22 Court assesses which claims asserted by the Brenneises were successful, and which were
23 unsuccessful. *Hensley*, 461 U.S. at 434. The focus of this analysis is whether any
24 unsuccessful claims are related to the successful ones. *See id.* In order to be
25 compensated for a claim on which they were not successful, the Brenneises must show
26

27 ⁹ The Ninth Circuit was clear in its opinion reversing this Court's 2012 fee award that "[o]ur decision
28 does not preclude consideration on remand of the degree of success as a relevant factor in determining
the amount to be awarded." *T.B.*, 806 F.3d at 477 n.12.

1 that “work on the unsuccessful claim [is] relate[d] to the work on [a] successful claim.”
2 *Medina v. Dist. of Columbia*, 864 F. Supp. 2d 13, 16 (D.D.C. 2012) (citing *Hensley*).
3 “The fee award, of course, should not reimburse the plaintiff for work performed on
4 claims that bore no relation to the grant of relief. Such work ‘cannot be deemed to have
5 been expended in pursuit of the result achieved.’” *Fox v. Vice*, 563 U.S. 826, 834 (2011)
6 (quoting *Hensley*, 461 U.S. at 435).

7 In order to determine the lodestar, the Special Master performed the requisite
8 analysis at the first step of the inquiry and recommended specific time deductions:

9 In this case, as a result of editing the bills by Plaintiffs’ lawyers and sustaining
10 some of the District’s objections, time spent exclusively on unrelated and
11 unsuccessful claims has already been deducted from the lodestar calculation.
12 The time entries that remain are either specific to the issues on which Plaintiffs
were successful . . . or relate to matters common to all related claims.

13 Doc. No. 366 at 132-33. For example, the Special Master reviewed counsel’s billing
14 records to ensure that the Brenneises’ did not receive an award for work performed at any
15 stage of the litigation related solely to their unrelated, unsuccessful civil rights claims.
16 Because the Court adopts the Special Master’s calculation of the lodestar, it is prohibited
17 from making any further reductions based on work performed by the Brenneises’ counsel
18 on these claims.

19 In contrast, the Special Master found all eighteen issues raised during the due
20 process hearing related, and as such, did not “deduct from the lodestar calculation time
21 spent on common matters nor . . . make any downward adjustment in the recommended
22 portion of the lodestar dealing with the OAH hearing.” Doc. No. 366 at 133. Likewise,
23 the Special Master found all the claims in the District’s complaint and Plaintiffs’ second
24 amended complaint related, and did not deduct time spent on related but unsuccessful
25 claims. *Id.* at 64. The Court agrees. However, the analysis does not end here.

26 The Court must go to step two and “complete the *Hensley* analysis by discussing
27 whether [the Brenneises’] significant accomplishments in this case justify the fee amount
28 requested.” *Thorne*, 802 F.2d at 1142 (citing *Hensley*, 461 U.S. at 434-37; *Rivera*, 106 S.

1 Ct. at 2691-92). In other words, the Court must analyze whether the success obtained by
2 the Brenneises is proportional to the efforts expended by counsel.¹⁰ *Hensley*, 461 U.S. at
3 434. This reflects the idea that when a prevailing party obtains “excellent results, his
4 attorney should recover a fully compensatory fee.” *Id.* at 435. When a party achieves
5 “only partial or limited success,” however, then compensation for all of the “hours
6 reasonably expended on the litigation as a whole . . . may be an excessive amount.” *Id.* at
7 436.

8 As the Ninth Circuit recently reminded district courts tasked with determining an
9 award of attorneys’ fees in an IDEA case, “[e]ven when a party is entitled to some fees,
10 the amount awarded must be ‘reasonable.’” *Irvine Unified Sch. Dist. v. K. G.*, 853 F.3d
11 1087, 1094 (9th Cir. 2017) (citing 20 U.S.C. § 1415(i)(3)(B)(i)). This statutory standard
12 intersects with the Court’s inquiry under *Hensley*. See *Urban ex rel. Urban v. Jefferson*
13 *County Sch. Dist. R-1*, 89 F.3d 720, 729 (10th Cir. 1996) (“Whether an award of
14 attorney’s fees is reasonable depends, in part, upon the degree of success obtained by the
15 plaintiff.”). At the heart of the Court’s determination is whether the Brenneises’
16 “accomplishments in this case justify the fee amount requested,” *Thorne*, 802 F.2d at
17 1142 (citation omitted), while remaining mindful that “[t]here is no precise rule or
18 formula for making these determinations,” *Hensley*, 461 F.3d at 436. The Court
19 considers the Brenneises’ success at each stage of this litigation.

20 a) OAH Due Process Hearing

21 The District argues that the Brenneises’ success on only three of the eighteen
22 issues considered by the ALJ during the due process hearing justifies a drastic reduction
23

24 ¹⁰ The Special Master’s lodestar calculation does not account for these factors, nor would it. He
25 understood that the Court was reserving this final determination – the most important one, according to
26 *Hensley* – for itself to make, as the Court clearly stated in the appointment order. See Doc. No. 360 at 5;
27 see also, *Aguirre v. Los Angeles Unified School Dist.*, 461 F.3d 1114, 1118 (9th Cir. 2006) (holding that
28 the “degree of success obtained” is the most critical factor in determining whether fees are warranted in
an IDEA case); *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005) (“The bulk of discretion
retained by the district court lies in the second, significance of relief, inquiry.”).

1 in the Brenneises' award of attorneys' fees and costs. The District asserts that counsel's
2 billing records show that they spent hundreds, if not thousands, of hours litigating the
3 additional fifteen issues upon which the Brenneises ultimately did not prevail. As such,
4 the District contends that the Court should reduce the billable hours related to the due
5 process hearing by 84%, which mathematically correlates to the Brenneises'
6 proportionate success. *See* Doc. No. 180 at 14. The Brenneises assert that "[t]aking into
7 consideration the relative importance of the issue on which Student prevailed, the limited
8 scope of the assessment issue, and the relative significance of the remedy he did obtain,
9 Student believes that the fees related to the administrative proceeding should be reduced
10 by no more than 10% in consideration of the fact that he did not prevail on the
11 assessment issue." Doc. No. 159-1 at 9.

12 The Brenneises lost on all issues related to the District's July 14, 2006
13 multidisciplinary assessment of T.B. *See* Doc. No. 1 at 72-74. Likewise, the Brenneises
14 failed to demonstrate during the due process hearing that the District denied T.B. a FAPE
15 for the 2006-2007 school year by failing to have an IEP in place at the beginning of the
16 school year. *Id.* at 74-75. The Brenneises also lost their claims concerning substantive
17 deficiencies and procedural violations by the District, in relation to the proposed August
18 30, 2006 IEP. *Id.* at 76-79. Even with respect to the proposed December 4, 2006 IEP,
19 the Brenneises did not enjoy complete success at the due process hearing. As the ALJ
20 noted in the OAH Decision:

21 [T]he District failed to meet its burden of proving that the December 4 IEP
22 provided Student a FAPE, because it failed to provide for specialized physical
23 health care services Student would need to access his education and failed to
24 provide an appropriate plan to transition Student from his home placement to
25 a school placement. However, . . . *the December 4 IEP proposal did offer*
Student a FAPE in all other respects.

26 *Id.* at 79 (emphasis added).

27 Although the Brenneises' success was limited to only a few issues, those issues
28 were sufficient for the ALJ to determine that the District had not provided T.B. with a

1 FAPE for the 2006-2007 school year. *Id.* The Brenneises achieved significant success
2 on the critical issue of T.B.'s g-tube feedings, without which he could not attend public
3 school. However, taking into consideration the scope of the due process hearing and the
4 terms of the amended IEP as ordered by the ALJ subsequent to the due process hearing,
5 the Court finds that the Brenneises' success, although significant, does not "justify the fee
6 amount requested." *Thorne*, 802 F.2d at 1142. Because of the extra work expended on
7 the numerous related, but ultimately unsuccessful claims, the total fee award is excessive
8 in relation to the degree of success obtained by the Brenneises, and as such, would not be
9 reasonable. *See Hensley*, 461 U.S. at 440 ("A reduced award is appropriate if the relief,
10 however significant, is limited in comparison to the scope of the litigation as a whole.").
11 A reduction to reflect the Brenneises' limited success is appropriate. *See Corder v.*
12 *Gates*, 947 F.2d 374, 379-80 (9th Cir. 1991) (noting that a full-fee award to a plaintiff
13 who achieves only limited success encourages litigation in a manner that Congress did
14 not intend).

15 While the Brenneises' lack of success as to fifteen out of eighteen issues might
16 recommend a great reduction in a purely mathematical sense, it is not so clear. Only nine
17 of the issues involved matters upon which the Brenneises completely failed to succeed –
18 assessment-related matters and issues surrounding the August 2006 IEP. The other nine
19 issues related to the December 2006 IEP, and the transition plan for moving T.B. out of
20 garage school and into public school. As noted above, the ALJ ultimately determined
21 that the December 2006 IEP was adequate in most respects, but not all. Approximately
22 20% of the ALJ's factual findings and legal conclusions related specifically to the issues
23 upon which the Brenneises prevailed; in the end, the Brenneises lost six out of the nine
24 issues they raised related to the December 2006 IEP. Yet an 84%, 80%, or even 66%
25 reduction in fees is too harsh in light of the results obtained – acknowledgment that T.B.
26 could not attend school based on the District's proposed IEP without placing his health
27 and safety at risk, and amendments to the IEP resolving the problem.

28 The District urges the Court to focus on the "big picture"– this litigation involved a

1 single school year and a one hundred-page IEP that the ALJ amended in only three
2 respects. The Brenneises exhort the Court to consider the “bottom line” – the District
3 denied T.B. a FAPE for the 2006-2007 school year by failing to provide the health
4 services necessary for him to attend public school. At the time, T.B. was a 12 year-old
5 boy who was “very unhappy about having to remain in the ‘garage school,’ particularly
6 as he was entering adolescence. He longed to socialize with his peers and have a more
7 normal life.” Doc. No. 159-3 ¶ 11. He lost that opportunity.

8 With all these considerations in mind, the Court finds that a fifty percent reduction
9 in the award of fees and costs¹¹ for work performed by the Brenneises’ counsel and their
10 staff during the due process proceedings strikes a more appropriate balance than
11 “apportion[ing] the fee award mechanically on the basis of [the Brenneises’] success or
12 failure on particular issues.” *Hensley*, 461 U.S. at 438. The resulting award will
13 sufficiently compensate counsel for the time and effort spent attempting to secure an IEP
14 that would have allowed T.B. to attend school with his peers, while not rewarding the
15 Brenneises for litigating numerous, unsuccessful claims at the due process hearing.

16 b) District Court Litigation

17 As set forth above, the fee award for litigation in this Court prior to the Ninth
18 Circuit appeal does not include time expended by the Brenneises’ counsel and their staff
19 solely on the Brenneises’ unsuccessful IDEA claim and their civil rights claims. With
20 respect to the remaining claims, the Special Master overruled the District’s objection to
21 fees for work that was common to all claims on the grounds that the successful and
22 unsuccessful claims were related. *See* Doc. No. 366 at 64. After making appropriate
23 deductions, the Special Master’s recommended award of fees and costs represents a forty
24 percent reduction to the amount of fees and costs requested by the Brenneises.

25 The Court adopts the Special Master’s finding that the claims litigated in this Court
26

27 ¹¹ The Court may reduce costs as well as fees to reflect the Brenneises’ limited or partial success. *See*
28 *Cummings v. Connell*, 316 F.3d 886, 899 (9th Cir. 2003); *Rodriguez v. Barrita, Inc.*, 53 F. Supp. 3d
1268, 1296 (N.D. Cal. 2014) (reducing costs by 20% because attorneys’ fees were also reduced 20%).

1 are related, and therefore must proceed to step two of the *Hensley* analysis and consider
2 “whether [the Brenneises’] significant accomplishments in this case justify the fee
3 amount requested.” *Thorne*, 802 F.2d at 1142 (citing *Hensley*, 461 U.S. at 434-37;
4 *Rivera*, 106 S. Ct. at 2691-92). The Brenneises ultimately prevailed defending against
5 the District’s IDEA claim, which confirmed the ALJ’s finding after the due process
6 hearing that the District had denied T.B. a FAPE for the 2006-2007 school year. As a
7 prevailing party, the Brenneises succeeded on their claim for an award of attorneys’ fees
8 and costs under the IDEA. The Court finds that no further reduction of the fee award for
9 work performed during this stage of the litigation is appropriate. The Special Master’s
10 recommended award fairly reflects the success achieved over the course of four years of
11 contentious, hard-fought litigation in this Court, while not rewarding the Brenneises for
12 time spent pursuing their unsuccessful claims.

13 c) Ninth Circuit Litigation

14 Likewise, the Brenneises did not seek an award of fees for work performed by their
15 counsel on appeal related to their unsuccessful civil rights claims. The Special Master
16 found that no reduction in the lodestar was appropriate for work done common to
17 successful and unsuccessful claims, explaining:

18 [T]he parties asserted a variety of claims, but they all arose out of a common
19 set of facts. Moreover, much of the work on the appeal, from preparing the
20 notice of appeal, to participation in the mediation, preparation of the appeal
21 briefs, and participating in a moot court to prepare for oral argument for the
22 successful claim for fees under the IDEA, is intertwined with the same tasks
23 performed for the claims for the civil rights claims for which no fees are
24 sought.

24 Doc. No. 366 at 99. The Court agrees, and finds no further reduction is appropriate under
25 the second step of the *Hensley* analysis. The Brenneises succeeded entirely on their
26 appeal of this Court’s award of attorneys’ fees and costs, as well as their claim for “fees
27 on fees” in relation to the CDE compliance complaint. Their attorneys achieved
28

“excellent results” on appeal, and should be compensated accordingly.¹² *Hensley*, 461 U.S. at 435.

C. Conclusion

In sum, the Court concludes that an equitable reduction of a portion of the Brenneises’ total award of attorneys’ fees and costs is appropriate under *Hensley* based on the Brenneises’ limited success during the administrative stage of these proceedings. Applying the percentage reduction results in the following adjusted total fee award:

<u>Proceeding</u>	<u>Fees & Costs Awarded</u>
Due Process Hearing (2006-2007)	\$563,049.79 \$281,524.90
District Court Proceedings (Including “Fees on Fees”) (2008-2012)	\$399,839.75
Ninth Circuit Appeal (Including “Fees on Fees”) (2012-2015)	\$203,670.00
Ninth Circuit Mediation (2016)	\$29,414.45
Post-Remand Proceedings (Including “Fees on Fees”) (2016-2017)	\$20,970.00
SUBTOTAL:	\$1,216,943.99 \$935,419.10
Supplemental Motion for Attorneys’ Fees Incurred Between January 19, 2017 and December 29, 2017	\$27,630.00
TOTAL:	\$1,244,573.99 \$963,049.10

¹² As set forth above, the Special Master has recommended a fifty percent reduction in the fees awarded for the work performed by the Brenneises’ counsel in relation to the Ninth Circuit mediation. *See* Doc. No. 366 at 121. The Court has adopted this recommendation and will not further reduce the award. The Brenneises should not be penalized for participating in unsuccessful mediation efforts. In addition, the Special Master has recommended an award of \$20,970.00 in fees for work performed by the Brenneises’ counsel in this Court post-remand. This represents a 75% reduction of the amount sought by the Brenneises for work during this final stage of the litigation. No further reduction is appropriate.

1 **7. Pre-Judgment Interest**

2 The Brenneises request an award of pre-judgment interest if the Court declines to
3 use current billable rates in its lodestar calculation. The District argues that pre-judgment
4 interest is not appropriate in an IDEA case, and point out that the Brenneises have not
5 provided any support for this request. The Special Master has recommended that the
6 Court not employ current billable rates in its calculation of the lodestar. *See* Doc. No.
7 366 at 35. The Court adopts this recommendation, and therefore must separately
8 consider the Brenneises' request for pre-judgment interest.

9 As one district court has recently noted, "it is an open question whether pre-
10 judgment interest may be obtained in an IDEA case." *McAllister v. District of Columbia*,
11 160 F. Supp. 3d 273, 277 n.1 (D.D.C. 2016). Nevertheless, the IDEA does not mandate
12 such an award, and therefore, an award of pre-judgment interest is "subject to the
13 discretion of the court and equitable considerations." *Oldham v. Korean Air Lines Co.*,
14 326 U.S. App. D.C. 375, 127 F.3d 43, 54 (D. C. Cir. 1997) (quoting *Motion Picture Ass'n*
15 *of Am., Inc. v. Oman*, 969 F.2d 1154, 1157 (D. C. Cir. 1992)). Generally, the purpose of
16 such awards is to compensate the plaintiff for any delay in payment resulting from the
17 litigation. *See id.*

18 The Court declines to award pre-judgment interest in this case. The Court
19 acknowledges that other courts have either expressly concluded or assumed that pre-
20 judgment interest is appropriate in the context of IDEA attorneys' fees claims, subject to
21 the court's discretion. *See, e.g., Termine v. William S. Hart Union High Sch. Dist.*, 288
22 Fed.Appx. 360, 363 (9th Cir. July 24, 2008) (unpublished); *Kaseman v. District of*
23 *Columbia*, 329 F.Supp.2d 20, 28 (D.D.C. 2004). However, there is no controlling legal
24 authority on this issue, and the Court finds the general justification for an award of pre-
25 judgment interest at odds with the purpose such an award would serve in this case.

26 "The essential rationale for awarding prejudgment interest is to ensure that an
27 injured party is fully compensated for its loss." *City of Milwaukee v. Cement Div., Nat'l*
28 *Gypsum Co.*, 515 U.S. 189, 195 (1995). In other words, pre-judgment interest is an

1 element of a successful *party*'s compensation. *See Osterneck v. Ernst & Whinney*, 489
2 U.S. 169, 175 (1989). Here, it is intended to compensate *counsel* for the delay in the
3 payment of their fees. This goes beyond the intended purpose of such an award when
4 attorneys' fees are awarded "to a prevailing party who is the parent of a child with a
5 disability," 20 U.S.C. § 1415(i)(3)(B)(i), and "[t]he Supreme Court has made it clear that,
6 in general, statutes bestow fees on parties, not upon attorneys." Doc. No. 329 at 6
7 (quoting *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip.*, 89 F.3d
8 574, 577 (9th Cir. 1996)).¹³

9 **8. *Special Master's Fees***

10 Finally, the Court must allocate payment of the Special Master's fees amongst the
11 parties. As the Court previously advised the parties, compensation for the Special Master
12 must be paid by the parties, as the Court has no fund available to cover the cost. *See* Doc.
13 No. 353. The Court must allocate payment of the Special Master's fees in a fair and
14 reasonable manner "after considering the nature and amount of the controversy, the
15 parties' means, and the extent to which any party is more responsible than other parties
16 for the reference to a master." Fed. R. Civ. P. 53(g)(2).

17 The nature and length of this litigation surpasses that of any other action over
18 which this Court has presided. The attendant accumulation of attorneys' fees resulted in
19 an "exceptional condition" which necessitated the appointment of a Special Master to
20 assist in calculating the final fee award. Fed. R. Civ. P. 53(a)(1)(B)(i). However, as
21 discussed above, neither party bears more responsibility than the other for this
22 circumstance. Accordingly, as indicated in its order directing payment of the Special
23 Master's fees, the Court determines that payment should be allocated equally between the
24 parties. *See* Doc. No. 384.

25 The Special Master's fees totaled \$57,370.00 for the work performed pursuant to
26

27
28 ¹³ Moreover, the Brenneises did not request an award of pre-judgment interest in either their original
complaint or their second amended complaint.

the Court’s appointment order. After reviewing the supporting invoices, the Court has approved payment of the full amount of fees requested by the Special Master. *See id.* In order to expedite payment while easing any potential burden on the Brenneises, the Court ordered the District to remit payment in full directly to the Special Master. *See id.* The District has now done so. *See* Doc. No. 385. The Brenneises’ share of the fees will be subtracted from their fee award. This results in a deduction of **\$28,685.00** from the Brenneises’ final award of attorneys’ fees and costs:

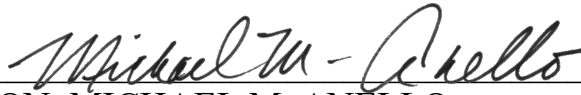
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Ninth Circuit Appeal (Including “Fees on Fees”) (2012-2015)	\$203,670.00
Ninth Circuit Mediation (2016)	\$29,414.45
Post-Remand Proceedings (Including “Fees on Fees”) (2016-2017)	\$20,970.00
SUBTOTAL:	\$1,216,943.99 \$935,419.10
Supplemental Motion for Attorneys’ Fees Incurred Between January 19, 2017 and December 29, 2017	\$27,630.00
TOTAL:	\$1,244,573.99 \$963,049.10
Special Master’s Fees	(\$28,685.00)
GRAND TOTAL:	\$934,364.10

1 **CONCLUSION**

2 Based on the foregoing, the Court **AFFIRMS IN PART** its previously issued
3 tentative rulings, **ADOPTS** the Special Master's Report and Recommendation in its
4 entirety, and **GRANTS IN PART** and **DENIES IN PART** the Brenneises' supplemental
5 motion for attorneys' fees and costs. The Court **GRANTS IN PART** and **DENIES IN**
6 **PART** the Brenneises' motion for attorneys' fees incurred between January 19, 2017 and
7 December 29, 2017. The Court apportions payment of the Special Master's fees equally
8 between the parties. Accordingly, the Court **AWARDS** the Brenneises **\$934,364.10** in
9 attorneys' fees and costs.

10 **IT IS SO ORDERED.**

11 DATE: February 23, 2018

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13 HON. MICHAEL M. ANELLO
14 United States District Judge
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